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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1213

TED DEAN BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1356

ROBERT BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Ted Dean Butler Pet. App. A) is reported at 472 F. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1972. A petition for rehearing was denied on February 7, 1973. On March 6, 1973, Ted Dean Butler's petition was filed.[1] Mr. Justice Douglas extended Robert Butler's time for filing a petition for a writ of certiorari to April 7, 1973, and the petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government suppressed evidence that it had promised that charges against the government's principal witness would be dropped.

2. Whether petitioners' trials before separate juries on each charge against them, pursuant to their own motion for severance, constituted double jeopardy.

3. Whether the evidence showed multiple conspiracies rather than two conspiracies, and whether the evidence was sufficient.

4. Whether 21 U.S.C. (1964 ed., Supp. V) 331(q) is unconstitutionally vague because it requires reference to 21 U.S.C. (1964 ed., Supp. V) 360a to determine which drugs are involved.

5. Whether entrapment was established as a matter of law.

6. Whether there were illegal searches or seizures.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioners were

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[1] Petitions for writs of certiorari have also been filed in this case by co-defendants Vincent Arias, No. 72-6538, and Manuel Rodriguez, No. 72-6535. We are responding separately to these petitions.

convicted of conspiring to possess dangerous drugs for sale and to sell dangerous drugs, in violation of 18 U.S.C. 371 and 21 U.S.C. (1964 ed., Supp. V) 331(q) (Count I). After a second jury trial, which had been severed from the first trial pursuant to petitioners' motion, they were convicted of conspiracy to conceal, transport, and sell heroin in violation of 21 U.S.C. (1964 ed.) 174 (Count V). Ted Dean Butler was sentenced to concurrent terms of two years' imprisonment on Count I and five years' imprisonment on Count V. Robert Butler was sentenced to concurrent terms of two years' imprisonment on Count I and seven years' imprisonment on Count V. The court of appeals affirmed (Ted Dean Butler Pet. App. A).

1. *The Government's Witness, John Durden.*

The government's primary witness at trial was co-conspirator John Durden. He testified that when some friends wanted drugs in June 1969, he obtained them from Joe Lovato,[2] whom he knew as a drug dealer (R.T. 576-578).[3] After this sale, Joe Lovato offered Durden a position selling drugs (R.T. 578, 581), which Durden accepted (R.T. 581-591). On September 9, 1969, Durden was arrested as he attempted to make a sale of amphetamines and barbiturates (R.T. 661-662). Petitioner Ted Dean Butler, who happened to be accompanying Durden, was also arrested (R.T. 662-667).

After the arrest and while in jail, Durden revealed to Ted Dean Butler that he was involved in a drug operation headed by Lovato (R.T. 668-669). Butler stated

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[2] Co-defendant Lovato fled from custody and now resides in Mexico. His cousin, co-defendant Leo Lovato, has also absconded to Mexico.

[3] "R.T." refers to the reporter's transcript of the trial; "Jury Tr." refers to a transcript of taped telephone conversations submitted to the jury.

he had not been aware of what was occurring, but now "might as well just go ahead and try and do my thing," and work with Durden in the drug operation (R.T. 671-672). At the time Durden had not begun cooperating with the government and, in any event, did not propose that petitioner become involved; petitioner volunteered (R.T. 668-673). According to Durden, petitioner thereafter became a part of the illicit drug operation by transporting and selling dangerous drugs for Lovato and distributing them to various customers (R.T. 978-980, 983-985, 674-675, 735-736, 750-751, 773-775).

After Durden's arrest, narcotics agents were first unsuccessful in their attempt to get him to cooperate with them (R.T. 681-682). Finally, in the middle of October 1969, after he had been indicted, Durden agreed to cooperate fully with the agents (R.T. 685). Thereafter, the agents had Durden make telephone calls to participants in the drug and narcotics conspiracies and record these calls on tape (R.T. 708-709).

2. *The Dangerous Drugs Charge (Count I).*

In a recorded conversation on October 27, 1969, Joe Lovato told Durden that "Ted and Bob [*i.e.*, petitioners] have been dealing all along" and "Bob has been getting in plenty * * *. They got about seven * * * that was the day before yesterday * * * they got ten" (Jury Tr. 215-216). In another taped conversation on October 31, 1969, Durden called Robert Butler and inquired whether Lovato would have "something" for him. Robert Butler discussed the quantity of drugs which Joe Lovato had and commented that he would go with Lovato on his next trip to replenish his supply (Jury Tr. 227-299). Durden also testified about his and Robert Butler's meeting with Joe Lovato in November, 1969. Robert Butler at that time placed an order for

"reds".[4] During the meeting Robert Butler went away with Leo Lovato, Joe Lovato's cousin, and returned stating that he had received his order (R.T. 747-749, 768-773). There was also a late 1969 meeting of the conspirators, including Robert Butler, wherein the shortage of drugs was discussed (R.T. 773-775). On December 12, 1969, Durden engaged in another recorded conversation with Robert Butler in which Robert Butler told him that a car had arrived and complained that although Leo Lovato probably got the load "he didn't even pass it on to anybody at all" (Jury Tr. 374).

In a November 19, 1969 conversation Joe Lovato told Durden to pick up four barrels of pills in San Diego and hide them. Durden then called Ted Dean Butler, who stated he would help him pick up the drugs (R.T. 735-736, 978-980).

When Leo Lovato was arrested in February 1970 and asked about dangerous drugs, he pointed out to the arresting agent where the drugs could be found. Included with them in a footlocker were two ledger books he used in the conspiracy. In one of these ledgers (G. Ex. 21, 1st Trial), "Bob" had a separate page used solely for his transactions. Listed therein were two drug entries, one of "5 R", the other of "20 R". Petitioner Robert Butler's telephone number was listed in the same ledger book (G. Ex. 21, 1st Trial). Other pages in the book showed "Ted" had also been dealing in "Reds" and "Whites". The other ledger (G. Ex. 15, 1st Trial) taken from Leo Lovato, indicated a list of 27 cars arriving on various dates and containing various amounts of "R's" and "W's" (Reds and Whites). In this ledger a page was devoted to "Bob" indicating he had received "5 R" from "C

[4] "Reds" is the common term for barbiturates and "Whites" is the common term for amphetamines.

no. 15" on 12/5. A search of Leo Lovato's trash by government narcotics agents revealed amphetamine residues and a scrap of paper with Robert Butler's telephone number on it.

3. *The Narcotics Charge (Count V).*

Durden first became involved with heroin when, in October 1969, Joe Lovato told him he could supply him with that substance (R.T. 42). Durden testified that on October 30, when he first met Robert Butler through Joe Lovato at Robert Butler's dress shop, heroin trade was discussed (R.T. 47-49). The next day Durden talked with Robert Butler again, and Butler said he would have to "go back to Ohio" to get a sample of heroin due to the poor quality supplied by Joe Lovato (R.T. 51). Durden testified that he was present when Robert Butler and Joe Lovato met to discuss a heroin purchase on about November 3. Robert Butler gave Joe Lovato an unknown amount of money, and told Lovato that he would know the next day—after testing a "sample"—if he wanted to buy five or six "pieces" (ounces) of heroin Lovato had ready in Mexicali, Mexico (R.T. 52-53).[5]

On the telephone with Durden, Joe Lovato extensively discussed Robert Butler's role in the heroin conspiracy. At a January 13, 1970 meeting, where Durden and narcotics agent Gordon took delivery of some heroin from Leo Lovato, Lovato in the presence of Agent Gordon, discussed "Bob's" complaints about heroin quality (R.T. 260, 263-265). Durden testified that on or about the 8th of December, he spoke with Robert Butler, who had recently returned from a trip to several cities "back East" to assess the trade in heroin there (R.T. 90-91). Later, in a December 9th meeting with

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[5] Durden also testified that it was one of his and Robert Butler's functions to acquire the cars to enable Lovato to secretly smuggle heroin from Mexico (R.T. 171-172).

Joe Lovato and Robert Butler, Lovato confronted Robert Butler, saying, "[w]hat are you trying to do, start a business back East with my money" (R.T. 92-93).

Ledger books seized from Leo Lovato (G. Exs. 4, 5, 2nd Trial) showed "Bob" receiving many "Pcs" ("pieces", or ounces of heroin). A notebook contained a telephone number traced to Robert Butler (R.T. 551-552, 561).

Ted Dean Butler also became involved in the sale of narcotics. In a December 1969 recorded conversation he told Durden about receiving heroin from Joe Lovato (R.T. 535). Leo Lovato's ledger also showed that Ted Dean Butler had received heroin from the Lovatos during the period of the conspiracy.

ARGUMENT

1. Petitioners assert that they were prejudiced during their trial because the prosecutor suppressed the alleged fact that the government had promised Durden that the indictment against him would be dropped and falsely stated to the trial court that he did not intend to dismiss the indictment against Durden, the principal witness against petitioners (Tr. 1938). Petitioner Robert Butler attempts to support these contentions with an affidavit of his counsel reciting counsel's belief that the prosecutor intended to drop the indictment, and with other affidavits from the counsel of co-defendants Rodriguez and King reciting that prior to trial during plea bargaining the prosecutor had indicated that the charges against Durden probably would be dropped.[6] These affidavits were first submitted on appeal. At that time the government offered to submit counter-affidavits to the court of appeals, but this offer was rejected by the court as unnecessary. But even assuming *arguendo*

[6] About two months after the last trial the charges against Durden were in fact dropped.

the correctness of these affidavits, they provide no support for petitioners' contention that there was reversible error.

Durden testified that he had not been promised a dismissal in consideration for his testimony (Tr. 796), but he did admit that he hoped for leniency in exchange for his cooperation with the government (Tr. 951, 953-954). The court accordingly allowed the defendants to argue to the jury that Durden had "great expectations" of dismissal, as anyone in a similar position would have. Thus the defense was allowed to attack Durden's credibility by arguing that Durden was testifying in expectation of dismissal.

The affidavits offered by petitioner Robert Butler do not even purport to establish that the prosecutor made any "promise" to or "deal" with Durden. They show different expressions by the prosecutor of his personal intentions—not communicated to Durden—to dismiss or not to dismiss the indictment against him. Thus the prosecutor told the court, "May I state for the record I do not intend to dismiss the case against John Durden" (R.T. 1938); whereas he told the attorney for co-defendant Rodriguez, Ronald Bain, that "I probably will dismiss [Durden's] case, but I haven't told him about it yet." (Robert Butler Pet. App. B.) Whatever the prosecutor's actual intentions with regard to Durden, there is no suggestion that any promise was made to him but withheld from the court and co-defendants at trial. Therefore, this case is not like *Giglio* v. *United States*, 405 U.S. 150, or *Napue* v. *Illinois*, 360 U.S. 264, upon which petitioners rely. In each of those cases the government's principal witnesses were allowed falsely to testify that they had not been promised leniency by the prosecution and the defense was consequently precluded from using this suppressed information in attacking the witnesses'

credibility. Here, as the court of appeals noted (Ted Dean Butler Pet. App. A, p. 5), there is no evidence that any such promise was made, and in any event, the defense was allowed to attack the witness's credibility by arguing that Durden had great expectations of dismissal.

2. Petitioners argue that they were placed in double jeopardy because they were tried before two juries and received two sentences on one indictment. Since, however, these separate trials were granted upon petitioners' motion for severance, they have no cause for complaint. Cf. *Smith* v. *United States*, No. 72-6083, certiorari denied, April 23, 1973 (dissent of Justice Douglas). Moreover, separate trials on one indictment do not amount to double jeopardy unless the issues to be litigated are the same. *Ashe* v. *Swenson*, 397 U.S. 436. There is no suggestion of a duplication of issues here.

3. Petitioners further contend that evidence at each trial showed multiple conspiracies rather than a single conspiracy to distribute illegal drugs and that the court should have delivered instructions on multiple conspiracies. But as the court of appeals noted (Ted Dean Butler Pet. App. A, p. 16), the evidence was "very persuasive that most of the co-conspirators not only knew of the others, but that all knew of and participated in the illegal plan of distribution of the amphetamines and barbiturates." There was thus evidence at each trial of a single conspiracy and the trial judge correctly concluded that no special instruction on multiple conspiracies was required. See *Blumenthal* v. *United States*, 332 U.S. 539. The related claim that the evidence was insufficient to show that petitioners participated in the conspiracies charged in Counts I and V is refuted by our recital of the facts in the Statement, *supra*, which shows that petitioners' participation was substantial.

4. Petitioners assert that 21 U.S.C. (1964 ed., Supp. V) 331(q), under which they were convicted (Count I),

is unconstitutionally vague. The argument is that vagueness resulted because the prohibition against the sale of certain drugs in 21 U.S.C. (1964 ed., Supp. V) 331(q)(2) and (3) (subsequently deleted by Pub. L. 91-513) required reference to 21 U.S.C. (1964 ed., Supp. V) 360a(b) and (c)(1) to determine which drugs were considered illicit, requiring a citizen to search the United States Code to determine whether the drug sales he intended to make were prohibited. However, the doctrine of incorporation by reference is hardly unusual and clearly does not amount to constitutional vagueness.[7]

5. Petitioner Ted Dean Butler contends that Durden's participation in the conspiracy amounted to entrapment as a matter of law. But petitioner voluntarily joined the conspiracy *before* Durden became a government agent. Therefore, petitioner failed to establish any creative activity by the government amounting to entrapment. *Sherman* v. *United States,* 356 U.S. 369; *Sorrells* v. *United States,* 287 U.S. 435. This Court recently rejected the contention that the participation of a government agent in the operational elements of a conspiracy amounts to a violation of due process. *United States* v. *Russell,* No. 71-1585, decided April 24, 1973.

6. Petitioners raise various search and seizure issues; none has merit.

a. Petitioners contend that Durden's activity collecting evidence as a government agent both by his direct

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[7] Petitioner Ted Butler also complains (Pet. 40-41) that the judge's instruction that amphetamine is a "stimulant" and barbiturate is a "depressant" within the terms of 21 U.S.C. (1964 ed., Supp. V) 360a denied him a jury trial. Clearly, however, this was a matter of law on which the judge could instruct the jury. It still remained for the jury to determine whether petitioners had conspired to possess or had sold such drugs.

observation and by his telephone conversations with the defendants amounted to illegal searches and seizures. As the court of appeals held (Ted Dean Butler Pet. App. A, pp. 2-3), however, statements and acts made in furtherance of a crime are not protected from direct observation by government agents or from electronic recording in telephone conversations with the consent of a party. 18 U.S.C. 2511(2)(d); *United States* v. *White,* 401 U.S. 745; *Hoffa* v. *United States,* 385 U.S. 293; see *United States* v. *Russell,* No. 71-1585, decided April 24, 1973; *People* v. *Canard,* 65 Cal. Rptr. 15, 29; *People* v. *Cruz,* 85 Cal. Rptr. 918; *People* v. *Caravella,* 85 Cal. Rptr. 576. Nor do the rights to *Miranda* warnings or assistance of counsel attach prior to arrest, while a crime is still being committed. Similarly there was no violation of *Massiah* v. *United States,* 377 U.S. 201, in these preindictment overhearings.[8]

b. Petitioners contend that the admission into evidence of a telephone number of Robert Butler and Charles King and some amphetamine residue, all found by federal agents in Leo Lovato's trash, and also a ledger seized at the time of Leo Lovato's arrest containing information about the distribution of drugs and narcotics to the defendants was error.[9] But as the court below

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[8] Additionally it was not error, as petitioners assert (Ted Dean Butler Pet. 40), to allow the jury to hear Durden's comments along with the defendants' statements in their conversations. As the court below noted, for the judge to have excised all of Durden's half of the discussions would have rendered the recorded conversations which were legitimate evidence, unintelligible (Ted Dean Butler Pet. App. A, p. 4).

[9] On February 6, 1970, federal agents arrested Leo Lovato. In the garage attached to the residence, they found 20,000 amphetamines in boxes in Lovato's car and in a footlocker (R.T. 1322-1325, 1352). They also found two ledger books in the foot locker and scraps of paper (R.T. 1323, 1330-1331). The location of these drugs had been pointed out to the officers by Leo Lovato.

ruled (Ted Dean Butler Pet. App. A, p. 7), petitioners lacked standing as persons aggrieved to object to the searches and seizures of the ledgers. *Alderman* v. *United States*, 394 U.S. 165. Moreover, the ledgers, which were found in Lovato's possession at the time of his arrest, contained accounting entries made during the course of the conspiracy. Since these entries were made in furtherance of the scheme, they were admissible against Lovato's co-conspirators. *United States* v. *Garelle*, 438 F. 2d 366, 369-370 (C.A. 2); *United States* v. *Bennett*, 409 F. 2d 888, 895, n. 6 (C.A. 2), certiorari denied, 396 U.S. 852, 402 U.S. 984.[10] Although the scraps of paper from Lovato's trash did not qualify under this rationale, nevertheless the court below correctly found that in view of other evidence in this case their admission was harmless (Ted Dean Butler Pet. App. A, p. 14). Moreover, petitioners do not explain how these papers may have prejudiced them.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1973.

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[10] The admission into evidence of such statements made in furtherance of a conspiracy by a non-testifying co-conspirator does not violate the right to confrontation. *Delaney* v. *United States*, 263 U.S. 586, 590; *United States* v. *Nall*, 437 F. 2d 1177 (C.A. 5); *United States* v. *McGann*, 431 F. 2d 1104 (C.A. 5), certiorari denied *sub nom. Pruitt* v. *United States*, 401 U.S. 919; cf. *Dutton* v. *Evans*, 400 U.S. 74.